

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

GERALD OSCAR PERSON,

Case No. 3:10-CV-01255-JE

Petitioner,

SUPPLEMENTAL FINDINGS AND
RECOMMENDATION

v.

MR. STEVE FRANKE,

Respondent.

JELDERKS, Magistrate Judge.

On August 15, 2012, the court signed an Order requiring petitioner to show cause within 30 days why his Petition should not be summarily dismissed as successive without Ninth Circuit permission. The Clerk's Office docketed that Order on August 21, 2012.

On September 19, 2012, the court signed a Findings and Recommendation (#31) in which it stated that "The court should dismiss the Petition for Writ of Habeas Corpus (#2) as successive without Circuit permission and enter a judgment dismissing this

case." F&R (#31), p. 2. The Clerk entered the Findings and Recommendation on September 20, 2012.

Also on September 20, 2012, petitioner filed a Response to the Order to Show Cause in which he asks the court to stay this action pending the outcome of a recently-filed application to the Ninth Circuit to file a successive petition. Petitioner has not only asked the Circuit for permission to file a successive petition, but also asked it to grant leave *nunc pro tunc* to the date the Petition in this case was originally filed.

The court has fully considered the Response to the Order to Show Cause wherein petitioner effectively concedes that he has presented a successive petition to the court without first obtaining Ninth Circuit permission. Petitioner was required to obtain the Ninth Circuit Court of Appeals' permission **prior to** filing this case. 28 U.S.C. § 2244(b)(3)(A). He did not do so. While petitioner has asked the Ninth Circuit to grant him leave to proceed with a successive petition, and to give him a *nunc pro tunc* designation to the date he filed this federal habeas action, it is unlikely that the Ninth Circuit will allow such a *nunc pro tunc* designation for an action it never previously took.¹

¹ The doctrine of *Nunc Pro Tunc* allows a court to later recognize and correctly memorialize action it previously took but which may not have been properly documented. It does not allow a court to engage in a temporal fiction.

Because it is clear that this case is successive without Circuit permission, the court should:

- (1) Decline to stay this action and rule accordingly on the pending Motion to Stay (#27);
- (2) Dismiss this action without prejudice to petitioner's right to refile the action should the Ninth Circuit Court of Appeals grant him leave to file a successive petition;
- (3) Issue a Judgment dismissing this action without prejudice; and
- (4) Decline to issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c) (2).

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 25 day of September, 2012.



John Jelderks
United States Magistrate Judge